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Creditors' Rights

Ian W. Freeman

M. T. Haynie III

CREDITORS' RIGHTS

COURT EXAMINES THE APPLICATION OF THE NECESSARIES DOCTRINE AND THE PRECONDITIONS OF A PERSON'S LIABILITY FOR THE DEBTS OF A SPOUSE

In 1984 the South Carolina Supreme Court, in *Richland Memorial Hospital v. Burton*,[1] extended the common-law necessaries doctrine in a gender-neutral fashion; the court expressly held "that the necessaries doctrine allows third parties providing necessaries to a husband or wife to bring an action against the individual's spouse."[2] More recently, in *Trident Regional Medical Center v. Evans*,[3] the South Carolina Court of Appeals specified the particular steps a creditor must take to establish a debt and recover from the non-debtor spouse under the necessaries doctrine.[4] Essentially, the *Evans* court held that both spouses are jointly and severally liable for necessaries obtained by their debtor mates.[5] *Evans* extends the common-law necessaries doctrine and creates a reciprocal support duty for both spouses. Creditors who find that the debtor spouse is unwilling or unable to pay for necessary goods or services now have a broad collection remedy—the non-debtor spouse's separate property and jointly owned property are subject to execution and levy.[6] In order to reach its conclusion, the *Evans* court was forced to maneuver around a prior appellate decision, *Anderson Memorial Hospital, Inc. v. Hagen*.[7] *Hagen* rather explicitly imposes upon a creditor an obligation to seek recovery from the principal-debtor spouse as a precondition to liability against the non-debtor spouse.[8] What the *Evans* decision does is explain what *Hagen* intended by requiring a creditor to "first seek to recover from the assets of the . . . primary obligor."[9] What is procedurally necessary?

At English common-law, the husband solely was liable for the expenses of necessary food, clothing, shelter, and medical services provided to his wife during cohabitation.[10] This, the necessaries doctrine, served to provide for

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1. 282 S.C. 159, 318 S.E.2d 12 (1984).

2. *Id.* at 161, 318 S.E.2d at 13.

3. 317 S.C. 346, 454 S.E.2d 343 (Ct. App. 1995).

4. *Id.* at 350, 454 S.E.2d at 345. For the actual steps see *supra* note 28 and accompanying text.

5. *See id.* at 350, 454 S.E.2d at 345-46.

6. *See id.*

7. 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994), *cited with approval in* Amisub of South Carolina, Inc. v. Passmore., 316 S.C. 112, 447 S.E.2d 207 (1994).

8. *Id.* at 499, 443 S.E.2d at 401.

9. *Id.*

10. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 250 (2d ed. 1988).

wives whose husbands failed to support them and their children[11] and "was founded on the husband's duty of support and his ability to use his wife's property to satisfy h[is] debts."[12] The need for such protection arose from the doctrine of coverture. Upon marriage, husband and wife were deemed to merge into one person so that the woman had no separate legal identity. As society and the law viewed the husband as the family provider, he retained the capacity to own and manage the marital property and to contract for goods and services.[13]

Until recently, American courts had retained the common-law doctrine of necessaries in a form virtually unchanged from its English ancestor. The status of women in modern American society, the protections provided by state equal rights amendments, and mid-level scrutiny of gender-based classifications under the Equal Protection Clause of the Fourteenth Amendment[14] have prompted many states either to modify the doctrine in a gender-neutral fashion[15] or to abandon it.[16]

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11. *See* North Carolina Baptist Hosps., Inc. v. Harris, 354 S.E.2d 471, 472 (N.C. 1987).

12. Richland Mem'l Hosp. v. Burton, 282 S.C. 159, 160, 318 S.E.2d 12, 13 (1984).

13. *See* John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1045-46 (1972). Implicit in the wife's incapacity to contract and own property was that all of her previously owned and subsequently acquired property became marital property under the dominion of the husband.

14. *See* U.S. CONST. amend. XIV, § 1 (providing that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws").

15. *See* St. Francis Reg'l Med. Ctr., Inc. v. Bowles, 836 P.2d 1123 (Kan. 1992); Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum, 417 A.2d 1003 (N.J. 1980); Medical Bus. Assocs., Inc. v. Steiner, 588 N.Y.S.2d 890 (N.Y. App. Div. 1992); *Harris*, 354 S.E.2d 471; *Burton*, 282 S.C. 159, 318 S.E.2d 12.

16. *See* Emanuel v. McGriff, 596 So. 2d 578 (Ala. 1992); Condore v. Prince George's County, 425 A.2d 1011 (Md. 1981); Schilling v. Bedford County Mem'l Hosp., Inc., 303 S.E.2d 905 (Va. 1983). Both the *Hagen* approach, which places primary liability on the debtor, and the *Evans* joint-and-several-liability approach have been adopted in a number of jurisdictions, but other jurisdictions have deferred modification to their respective legislatures leaving the original common-law doctrine intact. *See* Davis v. Baxter County Reg'l Hosp., 855 S.W.2d 303 (Ark. 1993); Shands Teaching Hosp. & Clinics, Inc. v. Smith, 497 So. 2d 644 (Fla. 1986); Hitchcock Clinic, Inc. v. Mackie, 648 A.2d 817 (Vt. 1993). Another approach, which recognizes that many women have not yet reached complete equality in the home or the workplace, places primary liability on the husband and secondary liability on the wife after the husband's assets are exhausted. *See In re* Estate of Stromsted, 299 N.W.2d 226 (Wis. 1980). This variation may not comport with intermediate level scrutiny of gender-based classifications under the Equal Protection Clause, but the Wisconsin Supreme Court has held that such a gender-based approach is constitutional because women are not similarly situated to men in their ability to contribute to the family's income despite having made advances in the job market. Marshfield Clinic v. Discher, 314 N.W.2d 326, 329, 331 (Wis. 1982). Still other jurisdictions have abrogated the doctrine altogether and left any chance for its return to the whim of the state legislature. *See* Emanuel v. McGriff, 596 So. 2d 578 (Ala. 1992); Condore v. Prince George's County, 425 A.2d

The status of married women began to improve in South Carolina with the enactment of the South Carolina Constitution of 1868, which gave married women the right to own and convey property separate from their husbands' property.[17] Reinforcing this right, the Married Women's Property Acts were passed in the late 1870's.[18] Finally, the South Carolina Constitution of 1895 expressly granted married women the capacity to contract.[19] Increased property and contractual rights, along with women's increasing prominence in all spheres of society during this century, have caused courts to reconsider the purpose of the necessaries doctrine in modern society.

Moreover, the United States Supreme Court has settled on an intermediate level of scrutiny in review so that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[20]

In *Richland Memorial Hospital v. Burton*[21] the South Carolina Supreme Court followed a host of other state courts[22] and found that South Carolina's codification of the necessaries doctrine in section 20-5-60 "denie[s] husbands equal protection of the laws by failing to impose a reciprocal obligation on wives."[23] Thus, the statute could not pass the intermediate level of scrutiny prescribed by the Supreme Court. Faced with similar constitutional arguments some courts have abandoned the necessaries doctrine.[24] The *Burton* court, however, construed statutory amendments[25] (that provided for alimony and the support of children in a gender-neutral fashion) as evidencing legislative

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1011 (Md. 1981); Schilling v. Bedford County Mem'l Hosp., Inc., 303 S.E.2d 905 (Va. 1983).

17. *See* S.C. CONST. art. XIV, § 8 (1868).

18. *See* Trident Reg'l Med. Ctr. v. Evans, 317 S.C. 346, 348, 454 S.E.2d 343, 344 (Ct. App. 1995).

19. S.C. CONST. art. XVII, § 9 (1895) (stating:

> The real and personal property of a woman held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall be her separate property, and she shall have all the rights incident to the same to which an unmarried woman or a man is entitled. She shall have the power to contract and be contracted with in the same manner as if she were unmarried.).

20. Craig v. Boren, 429 U.S. 190, 197 (1976).

21. 282 S.C. 159, 318 S.E.2d 12 (1984).

22. *Id.* at 160-61, 318 S.E.2d at 13; *see* Manatee Convalescent Ctr., Inc. v. McDonald, 392 So. 2d 1356 (Fla. Dist. Ct. App. 1980); Condore v. Prince George's County, 425 A.2d 1011 (Md. 1981); Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum, 417 A.2d 1003 (N.J. 1980); Schilling v. Bedford County Mem'l Hosp., Inc., 303 S.E.2d 905 (Va. 1983).

23. *Burton*, 282 S.C. at 160-61, 318 S.E.2d at 13.

24. Courts in Alabama, Maryland, and Virginia abandoned the doctrine and deferred any re-enactment of it to their respective legislatures. *See* Emanuel v. McGriff, 596 So. 2d 578 (Ala. 1992); *Condore*, 425 A.2d 1011; *Schilling*, 303 S.E.2d 905.

25. *See* S.C. CODE ANN. § 20-3-120 (Law. Co-op. 1976); S.C. CODE ANN. § 20-3-130 (Law. Co-op. Supp. 1995); S.C. CODE ANN. § 20-7-40 (Law. Co-op. 1976).

intent to expand the common-law.[26] The court drew further support from identified common-law trends in favor of expanded rights for wives. Specifically, the *Burton* court noted the extension of a loss of consortium to wives.[27] *Burton*, however, left unresolved the issue of what actions a creditor must take to collect from a non-debtor spouse.[28] *Evans* picked up where *Burton* left off. The *Evans* court established a precise, three-part test for the creditor's prima facie showing. That is, in order to recover under the necessaries doctrine, a creditor must prove:

> (1) necessaries were provided to the spouse; (2) the person against whom the action is brought was married to the person to whom the necessaries were provided at the time the necessaries were provided; and (3) despite demand therefor, payment for the necessaries has not been made by the person to whom the necessaries were provided.[29]

Evans was a consolidation of two collection actions by Trident Regional Medical Center against Linda P. and Henry A. Evans, and Patricia L. and Craig Drawdy for unpaid medical services.[30] Both defendant wives received medical attention during the course of their marriages, were billed for their treatment, and failed to pay the hospital.[31] Neither Mr. Evans nor Mr. Drawdy signed a personal guaranty for the debt incurred from the services. The trial court entered default judgments against both wives, but refused default judgments against their husbands because the hospital had not first brought suit against the wives individually. Trident then appealed.[32]

The *Evans* court examined the policy behind the common-law necessaries doctrine and the changing social patterns that had led to its gender-neutral application.[33] By looking at the necessaries doctrine as a creditor's remedy that historically induced creditors to provide a spouse with food, clothing, shelter, and medical treatment on the other spouse's credit but without his or her express guaranty, the *Evans* court reasoned that the doctrine would remain viable only if creditors could continue to rely on it for efficient reimbursement of necessaries.[34]

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26. *See Burton*, 282 S.C. at 161, 318 S.E.2d at 13.

27. *Id.* (citing Hiott v. Contracting Services, 276 S.C. 632, 281 S.E.2d 224 (1981)).

28. *Id.* at 161, 318 S.E.2d at 13-14.

29. Trident Reg'l Med. Ctr. v. Evans, 317 S.C. 346, 349-50, 454 S.E.2d 343, 345 (Ct. App. 1995).

30. *Id.* at 347, 454 S.E.2d at 344.

31. *Id.*

32. *Id.*

33. *Id.* at 347-48, 454 S.E.2d at 344.

34. *Id.* at 351-52 n.2, 454 S.E.2d at 346 n.2 ("[T]he necessaries doctrine historically has been a creditor's remedy, encouraging the extension of credit to married women . . . . Our approach

Although the original goals of the necessaries doctrine have diminished because the wife's role in the family context generally no longer fits the traditional stereotype of a dependent homemaker and because wives are no longer barred from owning property or contracting for goods and services,[35] the necessaries doctrine still recognizes marriage as an economic partnership. The court used the marital partnership concept with its "shared wealth, rights, and duties" to justify its imposition of joint and several liability.[36] The general idea is that under *Evans*'s rules of application, the necessaries doctrine will encourage providers of necessaries to meet familial needs with the assurance that all the financial resources of the family are available to satisfy the debt.[37]

The court reasoned that forcing creditors to seek judgment against the spouse who incurred the debt before taking action to collect against the secondarily liable spouse would discourage creditors from providing necessaries because of the increased burden of collection.[38] Thus, the court adopted North Carolina's approach of joint and several liability[39] with some minor modifications.[40]

The basis of the court's conclusion is that the necessaries doctrine is a creditor's remedy;[41] however, the announced purpose of the doctrine historically was to provide wives a remedy of support against husbands who failed to support them.[42] By recognizing that creditors were historically the primary beneficiaries of the necessaries doctrine because the doctrine saved

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simply recognizes that any remaining goals of the doctrine can be realized only if the doctrine is used and relied upon by creditors.").

35. *See supra* notes 10-13 and accompanying text.

36. *Evans*, 317 S.C. at 349, 454 S.E.2d at 345.

37. *Id.*

38. *See id.*

39. North Carolina Baptist Hosps., Inc. v. Harris, 354 S.E.2d 471 (N.C. 1987). The court found local support for imposing joint and several liability in *Ateyeh v. Volkswagen of Florence, Inc.*, 288 S.C. 101, 341 S.E.2d 378 (1986), in which the supreme court held that a wife had standing to sue her husband's insurance company for bad faith failure to pay her husband's medical bills because the wife was directly liable for non-payment. *Id.* at 103, 341 S.E.2d at 379. The *Ateyeh* court pronounced that the wife was "individually liable for medical expenses," *id.*, provided to her spouse; otherwise, the wife's interest in the suit would have been contingent on first finding the husband liable for the debt. *Evans*, 317 S.C. at 350, 454 S.E.2d at 345 (construing *Ateyeh*, 288 S.C. at 103, 341 S.E.2d at 380). The court reasoned that "[b]y virtue of the necessaries doctrine, Mrs. Ateyeh stands in a derivative policyholder position, and her interest in enforcement of the policy is not merely contingent." *Ateyeh*, 288 S.C. at 103, 341 S.E.2d at 380. If her interest were contingent, she would not have had standing to sue the insurance company.

40. *Evans*, 317 S.C. at 349, 454 S.E.2d at 345.

41. *See Evans*, 317 S.C. at 351-52 n.2, 454 S.E.2d at 346 n.2.

42. *See* CLARK, *supra* note 10, at 251.

creditors the cost of obtaining a husband's express guaranty, the court shifted its focus from the duty of spousal support to a pro-creditor approach.

The main criticism of the *Evans* joint-and-several-liability approach is that it fails to protect the non-debtor spouse's property when the debtor spouse is solvent yet unwilling to pay.[43] However, this criticism is unjustified when the non-debtor spouse is able to seek contribution or reimbursement from the debtor spouse. Thus, the modern necessaries doctrine shifts the burden of pursuing the debtor spouse to the non-debtor spouse without foreclosing the latter's remedies. Concerns also exist that the protections afforded by tenancy by the entirety of joint property, such as the marital home, will be nullified because joint and several liability reaches not only each spouse's personal assets but joint ones as well.[44] Because South Carolina abolished tenancy by the entirety in 1953,[45] loss of protections afforded to the tenancy by the entirety estate are no longer at issue.

Other criticism has focused on the negative effect of the original goal underlying the necessaries doctrine—providing support to a needy wife. Although a wife in need can still receive necessaries on her husband's credit under the modernized doctrine, one commentator has argued that "[c]reditors will give little weight to a needy wife's support right, yet will be wary of her potential liability for her husband's purchases, and thus will be more reluctant than ever to give her credit."[46] However, such a statement overlooks the fact that, by providing creditors with an alternate source of repayment in the broadened necessaries doctrine, the cost of credit is lowered to married women who have no credit of their own.

In conclusion, it appears that through its decision in *Evans* the South Carolina Court of Appeals has adopted a form of the necessaries doctrine that protects the creditor even though the same court had seemingly chosen an approach that protected the non-debtor spouse in *Hagen*. Creditors, particularly hospitals, should find the amended doctrine useful to satisfy outstanding debts for necessaries incurred during the course of the marriage. The new features that broaden the modern incarnation of the necessaries doctrine include liability upon the wife as well as upon the husband, abandonment of

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43. *See* Marcus L. Moxley, Note, North Carolina Baptist Hospitals, Inc. v. Harris: *North Carolina Adopts a Gender-Neutral Approach to the Doctrine of Necessaries*, 66 N.C. L. REV. 1241, 1246-48 (1988).

44. *Id.* at 1251-52. The Virginia legislature has recognized the need to protect the marital home and balance creditors' and debtors' rights and has enacted a statute that protects the marital home from the joint and several reach of the necessaries doctrine. VA. CODE ANN. § 55-37 (Michie 1995) (protecting the debtor's principal residence from the reach of creditors).

45. *See* Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953). The state's rejection of the legal fiction that husband and wife are a single legal entity was a precursor to tenancy by the entirety's demise. *See id.*

46. Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1783 (1984).

the common-law restriction that the creditor had to rely on the non-debtor spouse's credit in providing the necessaries, and diminished recognition of the spouse's ability to pay for the goods and services in defining what is necessary. As is evident in *Evans* and *Harris*, the non-debtor spouse does not have to personally guaranty the debts of the debtor spouse or take any other action that would cause the creditor to rely on the non-debtor spouse for payment. As medical expenses can rapidly run into hundreds of thousands of dollars, the family's standard of living and ability to pay is no longer recognized as a restriction upon what is deemed a necessary. Loss of these common-law checks and balances upon the necessaries doctrine has eased the burden for creditors in collecting debts. However, disappearance of these checks may also lead to extravagant spending by spouses in certain cases and to increased hardship when a family disaster strikes, such as loss of the marital home to satisfy bills for cancer treatment of the family breadwinner.[47]

Practitioners arguing against joint and several liability may consider the argument that the *Evans* court mistakenly viewed the policy of the necessaries doctrine as a creditors' remedy rather than as a means of support for destitute wives. Furthermore, joint and several liability fails to consider whether the primarily liable spouse needs the financial assistance of the non-debtor spouse. Finally, while applying the necessaries doctrine in a gender-neutral fashion comports with the Equal Protection Clause of the Constitution, joint and several liability may not take into account continuing disparities between the genders in levels of income and job opportunities.

Practitioners advocating creditors' rights should argue that, unless creditors can rely on the doctrine to expediently reimburse them, they will be reluctant to extend credit without a personal guaranty from the other spouse. Thus, the goal of providing support to a needy spouse will be defeated. Furthermore, if courts were to restrict creditors from collection against the non-debtor spouse until they obtained a judgment against the debtor spouse, creditors may be foreclosed from repayment when they are unsuccessful at personally serving the debtor spouse.[48] Practitioners may also want to pursue contractual and unjust enrichment remedies as alternatives to the collection remedy provided by the necessaries doctrine[49] and should still advise their creditor clients to get an express guaranty from the non-debtor spouse even though the necessaries doctrine does not require one.

Ian W. Freeman

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47. *See* S.C. CODE ANN. § 15-41-30(1) (Law. Co-op. Supp. 1995) (South Carolina's homestead exemption only exempts $10,000 of the residence's value from the bankruptcy estate in the case of property jointly titled in the name of the husband and wife and $5,000 if titled individually).

48. *See* Bethany Med. Ctr. v. Niyazi, 890 P.2d 349, 352 (Kan. Ct. App. 1995).

49. Jay M. Zitter, Annotation, *Modern Status of Rule that Husband is Primarily or Solely Liable for Necessaries Furnished Wife*, 20 A.L.R.4TH 196, 199 (1983).

II. ARE SECURED CREDITORS LIABLE FOR TORTS OF A REPOSSESSION SERVICE?

Section 36-9-503[1] of the South Carolina Uniform Commercial Code (UCC) permits secured creditors to take possession of collateral without judicial process if such repossession does not involve a breach of the peace.[2] Using this authorization to avoid the expense of court proceedings, some secured creditors contract with repossession services to take possession of collateral. If a repossession service breaches the peace during the repossession and injures a third party, then the question arises as to whether the contracting secured creditor is liable for the injuries.

This article discusses how a South Carolina court might rule on this issue. The inquiry is divided into two parts: (1) Is the repossession service a servant of the secured creditor? and (2) If the repossession service is not a servant, but an independent contractor, can the secured creditor still be held liable? South Carolina courts likely would find that a repossession service is not a servant, but an independent contractor; however, they likely would find that the secured creditor nonetheless is liable because the duty imposed in section 9-503 of the UCC is nondelegable.

South Carolina courts adhere to the doctrine of respondeat superior. Generally, a person is liable only for his or her own acts or omissions. The doctrine of respondeat superior, however, imposes liability on the master for torts committed by the servant and within the servant's scope of employment.[3] Therefore, a determination that a repossession service is the servant[4] of a

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1. "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace . . . ." S.C. CODE ANN. § 36-9-503 (Law. Co-op. Supp. 1995).

2. The South Carolina Supreme Court has defined "breach of the peace":

> In general terms, a breach of the peace is a violation of public order, a disturbance of pubic tranquillity, by any act or conduct inciting to violence. . . . It is not necessary that the peace be actually broken to lay the foundation of a prosecution for this offense. If what is done is unjustifiable, tending with sufficient directness to break the peace, no more is required.

Lyda v. Cooper, 169 S.C. 451, 455, 169 S.E. 236, 238 (1933) (citations omitted). No element of violence is required to constitute a breach of the peace. Thompson v. Ford Motor Credit Co., 324 F. Supp. 108, 115 (D.S.C. 1971).

3. South Carolina Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 179, 348 S.E.2d 617, 621 (Ct. App. 1986).

4. Some courts prefer the term "employee" to "servant." The meanings of these terms are the same and the consequences that flow from either label are the same. Simmons v. Robinson, 303 S.C. 201, 205, 399 S.E.2d 605, 607 (Ct. App. 1990), *rev'd on other grounds*, 305 S.C. 428, 409 S.E.2d 381 (1991).

secured creditor would render the secured creditor liable for all torts committed by the repossession service during repossession of collateral.

As yet, no South Carolina court has decided whether a repossession service is a servant or an independent contractor of the secured creditor. Coming close to the issue in *Jordan v. Citizens & Southern National Bank*,[5] the South Carolina Supreme Court characterized a repossession service as the agent of a secured creditor. Normally this characterization would have no effect on the issue of respondeat superior because liability under that doctrine can be imposed upon a party only for the torts of its servant.[6] An agent can be either a servant or an independent contractor.[7] A principal is not liable for the torts of an independent contractor.[8] Some South Carolina courts, however, have used the terms agent and servant interchangeably.[9] Because the court in *Jordan* found that no breach of the peace occurred,[10] the court did not discuss whether liability for a breach would have been imputed.

In ascertaining when a master-servant relationship exists, the South Carolina Supreme Court stated: "The determination of the question in each case depends largely upon its own factual situation, subject to certain established general principles."[11] The primary principle in the analysis concerns whether an employer has "the right to control the servant in the performance of his work and the manner in which it is done."[12] The *actual* control exercised is not determinative, but the *right* and *authority* to control

5. 278 S.C. 449, 450, 298 S.E.2d 213, 213 (1982) ("Midland Auto Recovery Service, Inc. acted as agent for the bank in bringing about the repossession.").

6. RESTATEMENT (SECOND) OF AGENCY § 2 cmt. b (1957) ("The word 'servant' is thus used to distinguish a group of persons for whose physical conduct the master is responsible to third persons. . . . For the purpose of determining whether or not the employer is responsible for their physical conduct, however, it is immaterial whether such persons are agents or not agents.").

7. *Id.* § 2 (defining servant as a type of agent and stating that an independent contractor may or may not be an agent).

8. *See* South Carolina Workers' Compensation Comm'n v. Ray Covington Realtors Inc., ___ S.C. ___, ___, 459 S.E.2d 302, 303-04 (1995).

9. *See* Jamison v. Howard, 275 S.C. 344, 350-51, 271 S.E.2d 116, 119 (1980) (stating that a reasonable juror could determine that tortfeasor was agent of defendant, making the defendant liable under respondeat superior); Self v. Goodrich, 300 S.C. 349, 354, 387 S.E.2d 713, 716 (Ct. App. 1989) (stating that negligence may be imputed if Goodrich found to be the "agent or servant of the hospital," but not if Goodrich found to be an independent contractor). *But see* Love v. Gamble, 316 S.C. 203, 213, 448 S.E.2d 876, 881 (Ct. App. 1994) ("An independent contractor can also be an agent; the two are not mutually exclusive.").

10. *Jordan*, 278 S.C. at 452, 298 S.E.2d at 214.

11. Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969).

12. Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 68, 437 S.E.2d 48, 49 (1993); *accord* Gamble v. Stevenson, 305 S.C. 104, 107, 406 S.E.2d 350, 352 (1991); Anderson v. West, 270 S.C. 184, 187, 241 S.E.2d 551, 553 (1978); *Young*, 252 S.C. at 189, 165 S.E.2d at 802.

the particular undertaking and the manner in which it is accomplished are the crucial aspects of the test.[13]

South Carolina courts have adopted a four-factor test to determine if the right to control exists: "(1) direct evidence of the right to, or exercise of, control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire."[14] Thus, the most important factor in deciding whether a repossession service is the servant of a secured creditor is the right or authority to control the repossession and the manner in which it is exercised.

Several cases provide helpful indications of how a South Carolina court would decide the issue. *Anderson v. West*[15] stands for the proposition that the employer need not actually exercise control over the other party in order for the other party to become a servant.[16] That is, even if a secured creditor exercises no actual control over a repossession, the repossession service may be a servant if the secured creditor could have exercised control.

The control exercised must be more pervasive than instructions to carry out a specific objective. In *Young* Southeastern Reconditioning Center hired Richard Young to drive cars from various destinations to Darlington, South Carolina.[17] Southeastern provided each driver with a specific route to take and a few minor regulations prohibiting driving in excess of the speed limit and driving while under the influence of alcohol.[18] Despite these instructions, the court held that no master-servant relationship existed between Young and Southeastern, stating:

> The mere fact that one of the contracting parties is empowered to give general directions as to what is to be done without control of the method or means of doing it does not necessarily have the effect of creating the relation of principal and agent or master and servant because such relates only to the result to be attained.[19]

In *Simmons v. Robinson*[20] the employer was concerned with the specific manner in which the obligation of agency was carried out. Specifically, *Simmons* addressed the issue of whether a foster parent was a servant of the South Carolina Department of Social Services (DSS). Because of the numerous and

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13. *Anderson*, 270 S.C. at 187, 241 S.E.2d at 553.

14. *Kilgore*, 313 S.C. at 68, 437 S.E.2d at 49-50; *accord* South Carolina Workers' Compensation Comm'n v. Ray Covington Realtors Inc., ___ S.C. ___, ___, 459 S.E.2d 302, 303 (1995); Chavis v. Watkins, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971).

15. 270 S.C. 184, 241 S.E.2d 551 (1978).

16. *Id.* at 187, 241 S.E.2d at 553.

17. *Young*, 252 S.C. at 190-91, 165 S.E.2d at 803.

18. *Id.* at 194, 165 S.E.2d at 804.

19. *Id.* at 196, 165 S.E.2d at 805.

20. 303 S.C. 201, 205-07, 399 S.E.2d 605, 608-09 (Ct. App. 1990).

detailed guidelines imposed on foster parents, the court concluded that DSS exercised significant control over the performance of the work and the manner in which it was done.[21] "By no means does DSS say to foster parents, 'Here is a child. Give us an adult.' Rather, it is clear that the agency reserves an interest in how the work of the foster parents is performed, not merely an interest in the finished product."[22]

When the principles from these cases are applied to the relationship between a secured creditor and a repossession service, it appears that a party injured by a repossession service during a repossession would encounter difficulty in proving that a secured creditor exercised sufficient control over the details of the repossession. In addition, analysis of the other factors in the four-part test suggests that only in rare circumstances will a repossession service be the servant of a secured creditor. If an employer pays a regular salary to another party, the inference that the party is a servant grows stronger.[23] However, a secured creditor would be expected to compensate a repossession service only upon completion of a repossession. Because of the inability to predict when or how often repossessions will take place, a secured creditor would not likely pay a regular salary to a repossession service. A master-servant relationship is also more likely when the employer furnishes equipment;[24] however, almost no situation can be envisioned in which a secured creditor would supply a repossession service the tools for a repossession. Finally, the right to fire is an indication of a master's control.[25] Secured creditors probably retain the right to terminate the relationship with a repossession service. This is the only factor in the four-part test that indicates a master servant relationship.

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21. On appeal, the supreme court held that DSS was not liable under respondeat superior for the tort of the foster parent because the foster parent was a licensee of DSS, not a servant or independent contractor. Simmons v. Robinson, 305 S.C. 428, 431, 409 S.E.2d 381, 383 (1991). The court stated that the existence of a right of control was irrelevant and added: "The legal status of the foster mother, as a licensee, makes it unnecessary to apply *Chavis* and the test for right of control." *Id.* at 431, 409 S.E.2d at 383.

22. *Simmons*, 303 S.C. at 208, 399 S.E.2d at 609. For other examples of courts examining control and right to control, see South Carolina Workers' Compensation Comm'n v. Ray Covington Realtors, ___ S.C. ___, ___, 459 S.E.2d 302, 303 (1995), which determined that a real estate salesman was an independent contractor because he set his own hours, chose his own clients, and received no payment unless he made a sale, and Gamble v. Stevenson, 305 S.C. 104, 108, 406 S.E.2d 350, 352 (1991), which characterized a subcontractor of Southern Bell as a servant because Southern Bell's cable repairman personally instructed him where to dig the pit, how to remove the sign, and how to replace the sign.

23. *See* Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 69, 437 S.E.2d 48, 50 (1993).

24. *See id.*

25. *See id.*

Some courts also look to the contract of employment when deciding if a master-servant relationship exists. In *Young* the court stated that the contract of employment should be given "considerable weight" in such a determination.[26] The inquiry should focus on the "intention of the parties which is to be gathered from the whole scope of the language used."[27] Nevertheless, language in a contract designating the relationship as one of employer and independent contractor is not dispositive.[28] The court relied on the contract in *Young* because the contract stated that the employee was an independent contractor.[29] Also, the court found that the employee realized the impact of his status as an independent contractor.[30]

Because classifying a party as a servant or an independent contractor hinges upon the facts of each case, no firm rule can apply every time a secured creditor hires a repossession service. Despite questions raised by the supreme court's characterization of Midland Auto Recovery Service as an agent of Citizens and Southern Bank in *Jordan*[31] and the contractual basis of *Young*,[32] a South Carolina court faced with the issue would likely hold as other jurisdictions have. For instance, in *Nichols v. Metropolitan Bank*[33] the Minnesota Court of Appeals held that the repossession service, R.J. Control Service, was an independent contractor. R.J. Control repossessed a car using its own method and at the time and place of its choice; the bank paid R.J. Control only after the completed repossession; R.J. Control provided its own materials and tools; and the bank could not fire R.J. Control as if it were a bank employee.[34] Faced with a factual scenario similar to *Nichols*, a South Carolina court should also rule that a repossession service employed by a secured creditor is an independent contractor.

If a South Carolina court determines that a repossession service is an independent contractor, the question remains as to whether a secured creditor is liable for torts committed by the independent contractor. South Carolina adheres to the general rule that an employer is not liable for tortious acts committed by an independent contractor.[35] Therefore, courts must determine if an exception exists by which the secured creditor could be held liable.

Other jurisdictions that treat repossession services as independent contractors have imposed liability on a secured creditor for the torts committed by a

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26. *Young*, 252 S.C. at 194, 165 S.E.2d at 805.
27. *Id.*
28. *Kilgore*, 313 S.C. at 68-69, 437 S.E.2d at 50.
29. *Young*, 252 S.C. at 194, 165 S.E.2d at 805.
30. *Id.*
31. 278 S.C. at 450, 298 S.E.2d at 213.
32. 252 S.C. at 194, 165 S.E.2d at 805.
33. 435 N.W.2d 637, 640 (Minn. Ct. App. 1989).
34. *Id.* at 639-40.
35. Duane v. Presley Constr. Co., 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978).

repossession service.[36] These courts have reasoned that the duty not to breach the peace is nondelegable and have relied on the Restatement (Second) of Torts (Restatement) section 424, which provides:

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.[37]

The Texas Supreme Court is one of two state supreme courts to address the issue of a secured creditor's liability for the torts of a repossession service. In *MBank El Paso v. Sanchez*[38] when Yvonne Sanchez defaulted on a note secured by her car, the secured creditor, MBank El Paso, hired El Paso Recovery Service to repossess the car. During the repossession, Sanchez got into the car and locked the doors. El Paso Recovery continued the repossession, towed the car to a repossession yard, and left Sanchez in the lot. Sanchez filed suit against MBank, alleging that MBank was liable for the torts of El Paso Recovery. MBank maintained that it was not liable because it delegated its duty not to breach the peace to an independent contractor.[39]

The court rejected MBank's argument, citing the Restatement for the proposition that parties under a statutory duty to provide certain safeguards can not delegate such a duty to independent contractors.[40] The court found that section 9.503 of the Texas Business and Commercial Code imposed a duty on MBank to take precautions for public safety during a nonjudicial repossession.[41] Therefore, if a breach of the peace occurred during the repossession of collateral for MBank, MBank was liable whether it committed the breach or an independent contractor committed the breach.[42]

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36. General Fin. Corp. v. Smith, 505 So. 2d 1045 (Ala. 1987); Sammons v. Broward Bank, 599 So. 2d 1018 (Fla. Dist. Ct. App. 1992); Fulton v. Anchor Sav. Bank, 452 S.E.2d 208 (Ga. Ct. App. 1994); *Nichols*, 435 N.W.2d at 640-41; Mauro v. General Motors Acceptance Corp., 626 N.Y.S.2d 374 (N.Y. Sup. Ct. 1995); McCall v. Owens, 820 S.W.2d 748 (Tenn. Ct. App. 1991); MBank El Paso v. Sanchez, 836 S.W.2d 151 (Tex. 1992).

37. RESTATEMENT (SECOND) OF TORTS § 424 (1965).

38. 836 S.W.2d 151, 152 (Tex. 1992).

39. *Id.*

40. *Id.* at 153.

41. *Id.* at 152. Texas adopted section 9-503 at the UCC verbatim.

42. *Id.* at 153. Other courts that have imposed liability on a secured creditor for the torts of an independent contractor during repossession have adopted identical reasoning. *See, e.g.*, General Fin. Corp. v. Smith, 505 So. 2d 1045, 1047-48 (Ala. 1987); Sammons v. Broward Bank, 599 So. 2d 1018, 1020 (Fla. Dist. Ct. App. 1992); Fulton v. Anchor Sav. Bank, 452 S.E.2d 208, 214 (Ga. Ct. App. 1994); Nichols v. Metropolitan Bank, 435 N.W.2d 637, 640 (Minn. Ct. App. 1989); Mauro v. General Motors Acceptance Corp., 626 N.Y.S.2d 374, 376-77

The Texas Supreme Court recognized that a secured creditor has a strong interest in seizing the collateral securing a defaulted loan.[43] However, the court balanced the interest of the secured creditor against society's interest in the public peace, stating: "If a creditor chooses to pursue self-help, it must be expected to take precautions in doing so. If this burden is too heavy, the creditor may seek relief by turning to the courts."[44] When MBank chose to repossess the collateral without the assistance of the judicial system, "it assumed the risk that a breach of the peace might occur."[45]

The Alabama Supreme Court also addressed the issue of a secured creditor's liability for the torts of a repossession service.[46] The court in *General Finance Corp. v. Smith* faced a situation almost identical to that in *Sanchez.* When a debtor defaulted on a loan the defendant hired a repossession service to retrieve the collateral. During the repossession the service breached the peace. The plaintiff sued, and the defendant bank claimed that it escaped liability because the repossession service was an independent contractor.[47] The court ruled that the duty imposed by section 9-503 of the Alabama Commercial Code was nondelegable, citing section 424 of the Restatement.[48]

Like the court in *Sanchez*, most courts finding that the duty to avoid a breach of the peace in a self-help repossession is nondelegable base their rulings on public policy. The Alabama Supreme Court in *General Finance Corp.* explained: "It is axiomatic that this duty is based on sound public policy."[49] In *Nichols* the Minnesota Court of Appeals pointed to the harsh nature of the remedy selected by the secured creditor and asserted that strict application of UCC section 9-503 was necessary to "prevent abuse and discourage illegal conduct."[50] In support of a similar ruling the Georgia Court of Appeals, in *Fulton v. Anchor Savings Bank*, stated: "We will not diminish this sound public policy by relieving a repossessing creditor of liability simply because the creditor employs an independent contractor to carry out the task of repossession."[51]

No court has ruled that a secured creditor can delegate to an independent contractor its duty to avoid a breach of the peace under UCC section 9-503.

(N.Y. Sup. Ct. 1995); McCall v. Owens, 820 S.W.2d 748, 751-52 (Tenn. Ct. App. 1991).

43. *Sanchez*, 836 S.W.2d at 154.

44. *Id.* at 154.

45. *Id.*

46. *General Fin. Corp.*, 505 So. 2d at 1047-48.

47. *Id.* at 1047.

48. *Id.* at 1047-48.

49. *Id.* at 1048.

50. 435 N.W.2d at 641; *see also* Mauro v. General Motors Acceptance Corp., 626 N.Y.S.2d 374, 377 (N.Y. Sup. Ct. 1995).

51. *Fulton*, 452 S.E.2d at 214.

Therefore, arguments for delegating this duty are scarce; however, two lengthy dissents in *Sanchez* outline several theories against nondelegability.[52]

In the first *Sanchez* dissent, Justice Cook maintained that the court created strict liability in an area in which it was inappropriate.[53] Although admitting that the facts in *Sanchez* may have justified imposition of liability on the secured creditor, Cook believed that the majority's ruling would unfairly disadvantage secured creditors who hire independent contractors to carry out repossessions. Justice Cook stated:

> If the plaintiff in this case goes back to trial and proves that the repossessor committed a breach of the peace, then the bank which hired the contractor is liable. Liability is absolute and extreme. The bank has no defenses, outside of proving that no breach of the peace occurred. Even if the bank had no knowledge of the contractor's actions, the bank cannot defend. Even if the bank expressly ordered the contractor to proceed cautiously, the bank cannot protest. Even if the bank did not knowingly or recklessly violate the statute, the bank will be exposed to punitive damages.[54]

Responding to the policy arguments proffered by the majority, Justice Hecht outlined a separate argument against extending liability to the secured creditor. Hecht contended that secured creditors would change many of their repossession policies.[55] Initially, secured creditors would use employees more often for repossessions.[56] When this would not be possible, secured creditors would be motivated to seek the more expensive but less risky option of judicial repossession over the less expensive but substantially more risky self-help repossession.[57] Even so, according to Justice Hecht, situations would arise when innocent creditors would incur liability in connection with actions of parties over which the creditors had no control.[58] These added expenses would lead to a substantial increase in the cost of credit.[59] Justice Hecht stated, "I doubt whether these costs—more cases for the courts, more litigation expense for creditors, and a dramatic increase in liability that is virtually unavoidable in at least some circumstances—are worth the change in policy the Court makes today."[60]

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52. *Sanchez*, 836 S.W.2d at 155-60 (Cook, J., and Hecht, J., dissenting).
53. *Id.* at 155 (Cook, J., dissenting).
54. *Id.* at 155.
55. *Id.* at 159 (Hecht, J., dissenting).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

Both dissenters believed that the court erred in deciding that the duty imposed by UCC section 9-503 was nondelegable. They based their arguments on the wording of the Restatement, which allows that an employer cannot delegate a statutorily imposed duty "to provide *specified* safeguards or precautions for the safety of others."[61] Many courts have interpreted the specified duty to be a duty not to breach the peace. The majority in *Sanchez* recognized UCC section 9-503 as imposing "a duty on secured creditors pursuing nonjudicial repossession to take precautions for public safety."[62] In *Nichols* the court said, "The duty to repossess property in a peaceable manner is specifically imposed on a 'secured party' by the uniform commercial code and is intended to protect debtors and other persons affected by repossession activities."[63]

The dissenters in *Sanchez* argued that the duty not to breach the peace is not a "specified" duty. In response to the assertion that the specified duty in UCC section 9-503 is the duty not to breach the peace, Justice Hecht stated, "This is at best an odd fit. Not to breach the peace may be a general guideline, but it is hardly a specified precaution."[64] Justice Cook voiced the same opinion and added that Texas has applied the principle of nondelegability to only one other group of statutes—those governing common carriers.[65] Common carrier statutes exist for the purpose of insuring safer highways, and the statutes require the carrier to obtain a permit granted by a particular state agency before carrying commodities.[66] Also, the statutes limit the people and entities that can operate a vehicle for hire. Finally, the common carrier statutes hold that anyone operating a vehicle under such a permit is an agent of and under the control of the permit holder.[67] Justice Cook pointed out that UCC section 9-503 does not limit the number of those allowed to operate repossession services, does not require special permits to operate a repossession service, and does not state that a repossession service becomes an agent of the secured creditor.[68] Justice Cook thereby maintained that UCC section 9-503 was not specific enough to mandate imposition of the nondelegability principle of Restatement section 424.[69]

No state court ruling on the issue of secured creditor's liability for the torts of a repossession service has accepted the arguments of the dissents in *Sanchez*. All courts finding a repossession service to be an independent

61. RESTATEMENT (SECOND) OF TORTS § 424 (1965) (emphasis added).
62. *Sanchez*, 836 S.W.2d at 153.
63. *Nichols*, 435 N.W.2d at 640.
64. *Sanchez*, 836 S.W.2d at 158 (dissenting opinion).
65. *Id.* at 156-57.
66. *Id.* at 157.
67. *Id.*
68. *Id.*
69. *Id.*

contractor have imposed liability on the employer of the repossession service for breaches of the peace. The issue, however, has not been addressed in South Carolina. In determining whether a South Carolina court would find the duty to avoid a breach of the peace nondelegable, analysis of South Carolina's approach to nondelegable duties is necessary.

The most recent South Carolina case to discuss nondelegable duty is *Simmons v. Robinson*.[70] The court asserted that some responsibilities are so important to society that they cannot be delegated: "A person who delegates to an independent contractor an absolute duty owed to another person or to the public remains liable for the negligence of the independent contract or just as if the independent contractor were an employee."[71] The court did not rely on section 424 of the Restatement, as did the courts from other states, in holding that the duty imposed by UCC section 9-503 is nondelegable.

In other circumstances the South Carolina Supreme Court also has ruled that certain duties cannot be delegated to an independent contractor. In *Wesley v. Holly Hill Lumber Co.*,[72] the court found that an employer could not delegate the duty to provide employees with a safe work place. The court in *Dolan v. City of Camden*[73] found that a municipality had a "fundamental responsibility" to provide safe streets and that even though the maintenance of the streets was undertaken by independent contractors, the municipality remained liable. Furthermore, South Carolina courts have found on several occasions nondelegable duties in land ownership.[74]

The decisions regarding such duties illustrate a willingness by South Carolina courts to find a duty nondelegable if a breach of the duty would bring harm to the public. Thus, in the UCC 9-503 context, a South Carolina court would likely be influenced by the strong public policy arguments articulated in other jurisdictions. In addition, a South Carolina court would not face the problem concerning whether the duty was specifically imposed by statute because South Carolina courts have found nondelegable duties without statutory support. In the face of the precedent established in all of the jurisdictions that have addressed the issue, a South Carolina court should rule

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70. 303 S.C. 201, 399 S.E.2d 605 (Ct. App. 1990), *rev'd on other grounds*, 305 S.C. 428, 409 S.E.2d 381 (1991). Before reviewing the court of appeals' nondelegable duty analysis, the supreme court reversed, holding that the DSS could not be liable because the foster parent was a licensee. Despite this reversal the propositions stated by the court regarding nondelegable duties remain valid.

71. *Id.* at 212, 399 S.E.2d at 612.

72. 211 S.C. 40, 46-50, 43 S.E.2d 619, 621-23 (1947).

73. 233 S.C. 1, 4-5, 103 S.E.2d 328, 330-31 (1958).

74. *See, e.g.*, Duane v. Presley Constr. Co., 270 S.C. 682, 244 S.E.2d 509 (1978) (finding landowner breached duty to neighbor when clearing of land by independent contractor resulted in silting of adjacent pond).

that a secured creditor cannot delegate the duty to avoid a breach of the peace during a nonjudicial repossession.

A South Carolina court would probably find a secured creditor liable for the torts committed by a repossession service during a repossession. Although the issue must be determined by the facts of each case, under normal circumstances a secured creditor will not have sufficient right of control over the manner in which the repossession is conducted to constitute a master-servant relationship. Thus, the court would likely find the repossession service to be an independent contractor. Despite this, South Carolina courts likely would rule that the duty imposed on a secured creditor to conduct nonjudicial repossessions without breaching the peace cannot be delegated. Therefore, the secured creditor should be liable for such breaches committed by a repossession service.

M. Todd Haynie, III